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In The

Supreme Court of the United States

October Term, 1992

ROBIN GANSLEY MITCHELL; ARTHUR J. BENVENISTE; WALTER J. BORDEN; CONRAD J. CHAVEZ; LOUIS SEIVERDING CORTEZ; SCOTT D. EVANS; ELIZABETH S. FORSBERG; HAROLD A. GIANCANELLI; VERA E. LeVEQUE; JOYCE A. MACKIE; BRUCE J. MACKIE; JOYCE McCANN; ANN M. NORTON; JOHN W. NORTON; JANET L. ROTHENBERG; CHERYL SHAPIRO; BETTY ANNE SIKKING; RALPH J. STAM; ALICE C. TURNER, and ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

UNITED TEACHERS-LOS ANGELES,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

MARSHA BERZON
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street
Suite 300
San Francisco, CA 94108
(415) 421-7151

LEO GEFFNER*
IRA L. GOTTLIEB
TAYLOR, ROTH, BUSH & GEFFNER
A Law Corporation
3500 West Olive Avenue
Suite 1100
Burbank, CA 91505
(818) 973-3200

Attorneys for Respondent
*Counsel of Record

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Petitioners,

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF CASE

The issue in this case arises from the application of the California Educational Employment Relations Act ("EERA"), Cal. Gov. Code §3540 *et seq.*, which "authorizes a public school district and a labor organization which

constitutes its employees' exclusive bargaining representative to agree upon an organizational security agreement whereby any of the employees who refuse to join the labor organization must pay it a service fee as a condition to continued employment." *Cumero v. Public Employment Relations Board*, 49 Cal.3d 575, 581, 262 Cal.Rptr. 46 (1989). While the EERA explicitly permits the agency fee for nonmembers to be set at an amount equal to one hundred percent of the dues amount the union charges to its members (Cal. Gov. Code §3540.1(i)(2)), the California Supreme Court has interpreted the statute as a whole to allow nonmembers who object to participation in certain union activities to pay a reduced agency fee, in an amount limited to a pro rata share of the cost of a union's activities in representing employees with the school board. *Cumero, supra.* The question which the Ninth Circuit correctly addressed is whether *all* nonmembers must be charged that reduced agency fee, whether they assert such objections or not, or whether those nonmembers who do not affirmatively object to paying the full agency fee after being fully informed by the union of the right to pay a reduced fee, and of the way to assert that right, can be charged the full fee. The Ninth Circuit held, in accordance with a long line of this Court's rulings, that properly informed nonmembers who do not object to paying the full fee can be required to do so.

1. Facts:

In February, 1990, the Union ("UTLA") sent a notice to nonmember bargaining unit employees of the Los Angeles Unified School District, advising them of their obligation to pay an agency fee of $41.00 per month

unless they communicate an objection to paying for non-representational UTLA activities. Those nonmembers who so objected within 30 days of the notice would pay a reduced fee of $34.70 per month, which amounts to 84.6% of the full UTLA membership dues. The notice explained how the reduced fee was calculated based on UTLA's expenditures and those of its state and national affiliates,[1] and enumerated cost items which were included as chargeable to nonmembers, and other items considered nonchargeable.

The Notice was explicit in its distinction between the rights and responsibilities of those who object to paying for nonchargeable activities of the Union and those who are willing to contribute financially to all Union activities by paying an agency fee equal to full UTLA dues, and was explicit as well in specifying the action required to be placed in the appropriate payment category:

> If you do not desire to pay a fair share fee equal to the full UTLA dues, you must send a letter by certified mail to the UTLA office within *30 days* of the mailing date of this notice. Upon receipt of such a letter, you will be required to pay the amount of $347.00 per year with $34.70 deducted monthly. If such a letter is not received by UTLA, then we will presume that you have no objections to being charged the full membership dues. [R:1, Exhibit D(1).]

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[1] UTLA is affiliated with the National Education Association, California Teachers Association, American Federation of Teachers, AFL-CIO and the California Federation of Teachers.

On February 13, 1990, UTLA sent all nonmembers a Supplementary Notice[2] setting forth the chargeable amount schedule, and again advising nonmembers of the consequences of choosing not to object to paying the full agency fee:

> You were notified that unless UTLA receives a notice from you within 30 days of the mailing of the previous notice, that you desire to pay the reduced amount or object to the non-chargeable percentage determinations, the District will deduct the full amount of UTLA dues based on the above schedule. [CR:1, Exhibit E.]

Petitioners in the district court initially conceded the dispositive point that "present law provides that, absent an affirmative objection, the union may collect the full amount of union dues. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 N. 16, *Cumero v. PERB*, 49 Cal.3d 575, 590" (R:14, p. 23). Petitioners nevertheless persuaded the district court to "modify" or "reverse" this precedent, and rule that a full agency fee could never be collected from nonunion members who did not object. *Id.* The court enjoined the union "from collecting any more than the reduced agency fee from nonunion employees 'unless the employee affirmatively consents to deduction of full union dues.' " 9 [Pet.App. 3a] Relying on this Court's cases addressing the question here presented, the Ninth Circuit [Schroeder, J., joined by Leavy and Fernandez, JJ]

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[2] The first notice to nonmembers was sent on or about February 7, 1990, followed up by the February 13, 1990 supplementary notice. In the supplementary notice, the requirement for notice of objection by certified mail was changed to one simply for receipt by UTLA of notice of the objection.

reversed the district court's judgment and held that "the procedures followed by the union to give [petitioners] the opportunity to object to the full agency fee complied with the applicable standard to ensure protection of their First Amendment rights." [Pet.App. 9a]

ARGUMENT

I. THE NINTH CIRCUIT DECISION IN THIS CASE PROPERLY FOLLOWED A LONG LINE OF SUPREME COURT PRECEDENT

A. This Court has Consistently Limited the Right to Pay a Reduced Agency Fee to those Nonmembers who Affirmatively Object to Paying the Full Fee

From the first occasion this Court has had to address a challenge to the right of unions representing employees to compel payment of dues, fees and assessments, it has acknowledged that unions have traditionally used a portion of those dues for political and ideological purposes, and has predicated any grant of relief, or even recognition of a viable employee claim thereto, upon the voicing of an affirmative objection to such use by that employee. The court below has fully explicated and reaffirmed the latter premise, which underlies *all* the Supreme Court cases in this area.

The Ninth Circuit reviewed the history of this Court's treatment of this issue, and concluded that there is

> no support for the [petitioners'] position . . . that affirmative consent to deduction of full fees is required in order to protect their First Amendment rights. The Supreme Court has repeatedly held that nonunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs. [Pet.App. 6a]

In support of this conclusion concerning this Court's teachings on the issue in this case, the Ninth Circuit succinctly traversed the "long line of Supreme Court cases beginning with *International Association of Machinists v. Street*, 367 U.S. 740 (1961)": [Pet.App. 4a]

> The issue in *Street* was whether a union "receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes." 367 U.S. at 749. The Court concluded that it should not. Avoiding constitutional issues, the Court construed the provisions of the Railway Labor Act to prevent a union "over an employee's objection" from using compulsory union dues to support political causes the employee does not favor. *Id.* at 770. Dealing with whether the employee has any obligation to make an objection known, the Court said in oft-repeated language that "dissent is not presumed – it must affirmatively be made known to the union by the dissenting employee." *Id.* at 774. "The union receiving money exacted from an employee under a union shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Id.*

Following the precedent set in *Street*, the Supreme Court in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 118-19 (1963), reaffirmed the requirement that, under the RLA, an employee who objects to the union's use of his deducted funds for activities unrelated to a union's representational role must make that objection known to the union. In addition, the Court stated that "[n]o respondent who does not in the course of the further proceedings in this case prove that he objects to such use [of agency fees by the union for nonrepresentational purposes] will be entitled to relief. This is not and cannot be a class action." *Id.* at 119. The meaning of this statement is clear: under the statutory scheme created by the RLA, employees who fail to object individually to the amount of the compulsory union dues have no right to receive relief from payment of those dues.[3] Accord *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970) (on remand in action against union under the RLA, district court should

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[3] Petitioners inaccurately label the above-quoted language in *Allen* as *dicta* to avoid its dispositive effect on their argument. Pet.App. 15 n. 10. Since the *Allen* Court concluded that there was a direct connection between affirmative objection and the issue of entitlement to relief which was before it, the Court's statements concerning the requirement of affirmative objection were essential to its legal conclusions, not *dicta*.

Moreover, the Court in *Allen* clearly intended to impose the minimal burden of objecting on *nonmembers*: the Court recognized that plaintiffs before it "were *not* union members," (emphasis supplied) and noted that the union did "not insist that employees actually join the union, but regard(ed) payment of the uniform exactions required by the agreement as complete compliance with (the union security agreement)." 373 U.S. at 119 and n.3.

include as plaintiffs only those employees who raised an objection to the use of agency fees for political purposes).

In *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 466 U.S. 435 (1984), and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Supreme Court addressed the procedures that a union should follow in order to safeguard the First Amendment rights of dissenting nonunion employees. The Supreme Court's premise continued to be that the state could constitutionally authorize the union to collect full dues provided those who objected to political or ideological expenditures would be permitted to pay an appropriately reduced share of the agency fee. The objective under the First Amendment was to "prevent[ ] compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." 475 U.S. at 302 (quoting *Abood* [*v. Detroit Board of Education*, 431 U.S. 209, 237 (1977)]).

The most recent Supreme Court decision in the area of agency fees is *Lehnert v. Ferris Faculty Ass'n*, 111 S.Ct. 1950 (1991), another case arising under Michigan's agency shop statute, and dealing with the nature of activities that could or could not be supported through the funds of objecting employees. Again, the premise remained that employees had the burden of objecting. See *id.* at 1959-60.

[Pet.App. 4a-6a]

Moreover, this Court's agency fee cases are in this regard fully consistent with other cases concerning the

First Amendment right of freedom from compelled speech. In *Wooley v. Maynard*, 430 U.S. 705, 715 (1979), this Court protected the right of New Hampshire motorists *to dissent* from the state's slogan on the license plate by obscuring it, but did not offer any protection to those who remained silent, and chose thereby to display the slogan, whether they agreed with it or not. Similarly, there is nothing discriminatory in notifying nonmembers ahead of time about the consequences of inaction, advising them of the minimal action necessary to avoid those consequences, and then treating those employees as if they understood the admonition. See Tribe, American Constitutional Law, 2d §45-5, p. 1317 n.21. In short, there is not one iota of legal authority for Petitioners' position, and no reason for this Court to consider this oft-addressed issue anew.

Further, the Ninth Circuit's conclusion and analysis concerning the question presented in this case were recently followed by the Sixth Circuit Court of Appeals in *Weaver, et al. v. University of Cincinnati*, ___ F.2d ___, 1992 U.S. App. Lexis 16717, 140 L.R.R.M. 2948 (6th Cir. July 23, 1992) (the cases leading up to and including *Abood* "stand for the proposition that dissenting union and nonunion members must inform the union that they oppose the use of their funds for ideological expenditures," relying upon the Ninth Circuit's *Mitchell* opinion).

Thus, Petitioners cannot point to a conflict among the circuits on this issue that might provide the basis for review and resolution by this Court.

In seeking to counter this Court's square holdings contrary to their position, Petitioners advocate a nonexistent and illogical contextual distinction between this case and all the Supreme Court cases to date: according to Petitioners, only *members* may be required to act affirmatively to prevent a full dues deduction. However, none of the Court's cases relied upon by the Ninth Circuit have ever suggested that such a distinction should be applied, Indeed, as the Ninth Circuit recognized, the *Abood* opinion, "which, [because it involved nonmember plaintiffs] most closely addresses [Petitioners'] situation and most clearly rejects their position. . . . " [Pet.App. 7a], "was dealing with an issue of individual constitutional rights *and held that all plaintiffs, not just those who were union members,* were required to voice their objection to payment of the full agency fee." [Pet.App. 8a] Hence, as noted in the Ninth Circuit's review of this Court's precedent, quoted *supra,* the consistent commonsense principle that underlies the entire line of cases is that if an employee wishes his objection to be addressed, he must take the elementary step necessary to make that objection known.[4] Therefore, as the Ninth Circuit concluded, from

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[4] Petitioners cannot draw support from *Chicago Teachers v. Hudson,* 475 U.S. 292 (1986), which in their view, signalled the adoption by this Court of a new meaning to the burden to object. According to Petitioners, that burden applies only to nonmembers after the "impartial decisionmaker's" proceeding commences, and then only to the *calculation* of the reduced agency fee. Pet.App. 22.

Nothing in *Hudson* supports Petitioners' view. See 475 U.S. at 306 n.16. The Court never suggested that it was altering its

Street to *Lehnert*, this Court has consistently permitted unions to require objectors of *all* stripes affirmatively to voice their objections to political and nonchargeable expenditures, rather than presuming dissent.

B. The Agency Fee Cases are Consistent with other Cases Concerning the Obligation to Voice Dissent

The Ninth Circuit appropriately analogized the Union's notice to nonmembers, which provides them with an opportunity to "opt-out" of paying full dues simply by voicing an objection, with similar "opt-out" procedures applicable under Rule 23 of the Fed. R. Civ. P. (Pet.App. 8a-9a). In both instances (and unlike the criminal context Petitioners rely upon), recipients are under no coercion or inducement whatever to forego assertion of their right to dissent once informed of the means by which to do so. The most recent case decided by this Court upholding such procedures, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), therefore concludes that it is

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unbroken line of precedents, especially *Abood*, which are fatal to Petitioners' position.

Moreover, the distinction between dissent from *calculation* of the fee and dissent from paying the full amount of union dues has no constitutional significance. The same constitutional right – to prevent undesired use of moneys for political and ideological purposes – is implicated in either act of dissent. Thus, since as even Petitioners concede, they can constitutionally be required to affirmatively object to the fee *calculation*, there is no constitutional infirmity in requiring them to affirmatively object to payment of the full fee. Pet.App. 22.

sufficient for the "opt-out" notice to provide the nonmember with an opportunity to exclude himself from the binding effect of the action which is the subject of the notice. Furthermore, as this Court noted in *Shutts*, the proven willingness of many nonmembers affirmatively to object (or in this case, to come forward to join the union) in response to the clear notices provided is a strong indication of the efficacy of the procedure. 472 U.S. at 813.[5]

Moreover, a correct application of the "knowing and intelligent" standard borrowed from the criminal law context would still yield the result that the Union's procedure was appropriately respectful of Petitioners' rights. *Johnson v. Zerbst*, 304 U.S 458 (1938). The Union informed

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[5] Petitioners rely heavily on a district court case, *Federal Election Comm'n v. National Education Ass'n*, 475 F.Supp. 1102 (D.D.C. 1978) for their claim of unconstitutionality of UTLA's agency fee practice. Aside from the fact that the case, if still valid, would obliterate Petitioners' laboriously-crafted distinction between members (who they must admit can be required to pay full dues in the absence of an affirmative objection) and nonmembers (who, they claim despite all authority to the contrary, cannot be so required), it is missing one significant distinguishing fact: in *NEA*, there was no opportunity for the members to *prevent* objectionable deductions; rather, there was only the possibility of eventual refund. In the case at bar, and in *Kentucky Educators Public Affairs Counsel v. Kentucky Registry of Election Finance*, 677 F.2d 1125 (6th Cir. 1982), where the Court of Appeals upheld a payroll checkoff for political contributions *unless* the members affirmatively opted not to contribute, there were such *preventative* opportunities afforded to employees; the Sixth Circuit distinguished *NEA* on that ground. 677 F.2d at 1132. *NEA* therefore has no application to this case.

nonmembers of their rights to object, the simple communicative act needed to preserve the right, and the consequences of a failure to object; this Court does not require more even of police interrogators. Cf. e.g., *McNeil v. Wisconsin*, 501 U.S. ___, 115 L.Ed.2d 158 (1991). Petitioners have presented no reason to apply the criminal standard, and cannot prevail even if it were applicable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARSHA BERZON
ALTSHULER, BERSON, NUSSBAUM, BERZON & RUBIN
177 Post Street
Suite 300
San Francisco, CA 94108
(415) 421-7151

LEO GEFFNER*
IRA L. GOTTLIEB
TAYLOR, ROTH, BUSH & GEFFNER
A Law Corporation
3500 West Olive Avenue
Suite 1100
Burbank, California 91505
(818) 973-3200

Attorneys for Respondents
*Counsel of Record

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